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No. (1)

Supreme Court, U.S.
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In The
Supreme Court of the United States

RYAN WHITESIDE,

Petitioner,

v.

RUSSELLVILLE NEWSPAPERS, INC., PAXTON MEDIA GROUP, LLC, NEAL RONQUIST, SCOTT PERKINS AND JANIE GINOCCHIO,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arkansas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents the question whether the Fair Report Privilege under the First Amendment protects a media defendant from liability for reporting false and defamatory statements about a private party Petitioner based on information contained in an unconfirmed preliminary narrative in unofficial police documents not intended for release to the press. Specifically:

> Where media defendants receive an inadvertently released police document and know that it contains unconfirmed hearsay and investigative notes, is the publication of information from that document covered by the Fair Report Privilege?
>
> Is any Fair Report Privilege lost where a newspaper article goes beyond the "gist and sting" of the narrative in the inadvertently released police report by placing the false rape allegations in the context of an up-coming sensational murder trial?

PARTIES TO THE PROCEEDINGS

The Petitioner is Ryan Whiteside, who was plaintiff-appellant below.

The Respondents are Russellville Newspapers, Inc., Paxton Media Group, LLC, Neal Ronquist, Scott Perkins and Janie Ginocchio, all of whom were defendants-appellees below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully asks the Court to issue a writ of certiorari to review the final judgment of the Supreme Court of Arkansas. This case gives the Court the opportunity to correct Arkansas's extension of the Fair Report Privilege to actions that it was not intended to cover. By reviewing this case, the Court can strike the proper balance between two of society's most important competing rights – namely, having a responsible free press and protecting private individuals from defamation.

OPINION AND JUDGMENT BELOW

The circuit court's order is reprinted in the Appendix at App. 19-23. The Arkansas Supreme Court's opinion is unofficially reported at 2009 WL ___ and reprinted at App. 1-18. The order denying rehearing is reprinted at App. 26.

STATEMENT OF JURISDICTION

The Arkansas Supreme Court issued a judgment and opinion on March 12, 2009, involving a right or privilege under the Constitution of the United States. Petition for rehearing was denied on April 16, 2009. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

The Fourteenth Amendment extends the protection to State action: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

STATEMENT OF THE CASE

Introduction

This case presents a conflict between press freedom and the right of a private individual to protection of his reputation from defamation, which are both "plainly rooted in the traditions and significant concerns of our society." *The Florida Star v. B.J.P.*, 491 U.S. 524, 105 L.Ed. 2d 443 (1989).

The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

The Fourteenth Amendment extends the protection to State action: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Freedom of the press is further encased in the Constitution of the State of Arkansas, Article 2, Section 6: "The liberty of the press shall forever remain inviolate. The free

communication of thought and opinions is one of the invaluable rights of man; and all persons may freely write and publish their sentiments on all subjects, *being responsible for the abuse of such right* [emphasis added]." This Court has long recognized that the freedom of the press is not absolute, and that among the limits on that freedom is a media defendant's potential liability for defamation. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Petitioner sued for libel alleging that Respondents defamed him by falsely stating that he had engaged in a criminal sexual wrongdoing.

Respondents sought summary judgment based on the First Amendment as applied through the Fair Report Privilege.

Respondents admittedly acted without regard to the truthfulness of the statements in their newspaper articles.

The circuit court granted Respondents' motion for summary judgment, finding that Respondents were shielded from liability for the defamatory articles by the Fair Report Privilege.

The Proceedings Below

Petitioner sued Respondents for libel based upon three articles published by The Courier of Russellville, Arkansas, reporting on rape charges made to the Russellville police by two young women following

a holiday gathering of students attending Arkansas Tech University. (App. 1; T. 307)

On December 28, 2006, Petitioner and his roommates invited friends, including Kevin Jones, over for a holiday gathering at a house they rented to attend Arkansas Tech University. (T. 307) The students played card drinking games and drank beer. (T. 322-23) After a midnight trip to the Waffle House for food (T. 312), some of the group returned to the rental house where Jeff Simmons had sex with Jessica Roper. (T. 326)

Three days later, on New Year's Eve, Jessica Roper and her cousin, who was not at the gathering, gave statements to the Russellville Police in which Roper said that she had consumed a couple of alcoholic beverages at the gathering and woke up the next morning at the house where it was held and was sore "down there" but couldn't remember what had happened. The cousin's statement was that someone who was at the gathering told her that Simmons had given Roper something to drink and had sexual intercourse with her and that Petitioner had sexual contact with Roper. (T. 160)

The statements were attached to a police report, or blotter, giving the basic facts of the criminal allegations, on which was hand-written "Investigation – No Press." (T. 10-13, 337) The blotter and the witness statements were typed into the police AEGIS computer system without "permissions" or restrictions placed on the press access to the statements,

which was contrary to standard policy of the department. (T. 334-37; T. 345)

On January 10, 2007, The Courier daily newspaper in Russellville, obtained copies of the blotter and statements with the access key they had been given by the police. (T. 341) The police report which the author of the article was working from was not something that was downloaded and printed out the way it was from the AEGIS system; it was cut and pasted from the system and another reporter later added comments, so the author did not know what the actual AEGIS police report looked like at the time the article was written. (T. 356)

Because The Courier had been told by the press liaison with the police department, Lt. Falwell, not to expect anything but the blotter on the alleged rape, when a reporter with the paper was able to access it through AEGIS, the editor, Perkins, and the reporter he assigned to write a story, Ginocchio, called Lt. Falwell to find out what had happened. He said "you must have a good reporter because I'm locked out by permissions from accessing it myself and can't comment because the investigation has been turned over to the State Police." (T. 367, 368) The reporter called the prosecutor who had no comment because there was an ongoing investigation. (T. 139)

Perkins approved the reporter's story knowing that there was an ongoing investigation. (T. 360) He would not have run the report if his reporter had gone to the police station and obtained the written Case

Report stating "under investigation, no press." (T. 372) He further states: "I presume everything I can get on the Aegis system is a public document. It's possible that I was given the second part of that, the Christina Robison statement, by mistake." (T. 375) Being judicious about naming criminal suspects before the formal filing of charges is not the policy at The Courier. (T. 355) The publisher of The Courier, Ronquist, was fully involved throughout the day the story was formulated. (T. 361)

On January 11, 2007, The Courier ran a front page banner headline article captioned "ASP investigates alleged rape" which prominently mentioned the connection of Petitioner and Kevin Jones to the Nona Dirksmeyer murder case. The article paraphrased and quoted extensively the cousin's hearsay allegations that Jeff Simmons raped Jessica Roper and that Petitioner had sexual contact with her while she was under the influence of drugs. (T. 8-9, 169) The murder trial of Kevin Jones, in which Petitioner was considered to be a material witness, was to begin one week after the article was published. (T. 349)

On January 12, 2007, Prosecuting Attorney Gibbons issued his determination letter stating that he declined to file charges in the alleged rape because of email messages from Roper to Simmons on December 29, 2006, indicating that the sex between the two was consensual. The Determination Letter contained the following statements:

> Therefore, we are left with no evidence to support a charge of rape. It should be noted that there is no evidence at all that Ryan Whiteside or Kevin Jones, both of whom were also mentioned in the initial incident report, had any sexual contact with the complainant at any time during the 28th and 29th of December.

(T. 194)

The Courier obtained a copy of the prosecutor's letter on January 13, 2007, and ran a second article on Sunday, January 14, 2007, on its front page with a bold headline "No Charges Filed in Alleged Rape" (T. 169) which reported that Gibbons had made the determination not to file charges in the alleged rape because "the case wasn't strong enough to prove the rape allegation[.]" The second article also included a quote from Gibbons directly to the newspaper on January 13 that "there was a lack of evidence for prosecution" but it did not include the statement in the prosecutor's determination letter that there is no evidence at all that Petitioner had any sexual contact with the complainant. The second article repeated many of the cousin's hearsay allegations and added additional details from the State Police report. Such report included an interview with the alleged source of the information who denied she told the cousin anything negative about Petitioner and Kevin Jones. (T. 169)

In response to a complaint to Respondents from Petitioner's father (T. 119-20), the Respondents printed a third article about the alleged rape, the Clarification, which included the statement in the prosecuting attorney's Determination Letter exonerating Petitioner from any culpability, but which also added a statement that Simmons had told the State Police that Petitioner and Jones were in the room while Simmons allegedly had sex with the accuser and reminded readers of the connection to the "Jones Trial." (T. 17, 171)

In deposition testimony given in this cause, Petitioner denied having any sexual contact with Roper at the gathering (T. 316-17); Roper said Jeff Simmons had sex with her but nobody else did (T. 318); Huckabay said she never told Robison that she went back into the room and saw Petitioner having sexual contact with Roper (T. 200); Huckabay does not believe anyone other than Simmons engaged in any sexual act with Roper that night (T. 332); and Simmons never saw Petitioner have any kind of sex with Roper. (T. 327)

During the period of time the three articles about the alleged rape appeared in The Courier, Ginocchio posted online comments both in her own name and under an assumed name "lemoncello" to crimelibrary.com, an internet website which was a forum for debate about the Dirksmeyer murder case. (T. 362-65) Her intent was to be anonymous when commenting on her own articles in The Courier, and she didn't want anyone to see her name and think she was

speaking for the paper. (T. 363-64) Her "lemoncello" posts refer to Kevin Jones ("KJ") watching the alleged assault, which he "probably enjoyed, and did nothing to stop," attacking the character of Chelsea Huckabay for "not doing anything to stop it either," and warning "don't get raped in Pope County." (T. 362) Ginocchio was saying that even though the state's attorney decided not to prosecute, there really was something to those allegations. (T. 366)

The trial court granted Respondents' Motion for Summary Judgment on November 19, 2007, on grounds of the Fair Report Privilege. (T. 428)

The Supreme Court of Arkansas issued its opinion and judgment on March 12, 2009 (App. 1-18), and it overruled Petitioner's petition for rehearing on April 16, 2009. (App. 26)

REASONS FOR GRANTING THE PETITION

This case presents a clear opportunity to settle issues relating to the tension between competing rights – namely, having a responsible free press and protecting private individuals from false and defamatory publications by a media defendant. Some guidance has been provided by the Restatement (Second) of Torts § 611, which has been followed by many courts. In purporting to follow Section 611, the Arkansas Supreme Court, however, has expanded the Fair Report Privilege in such a way as to provide less protection to private individuals from irresponsible

press action than would be provided in other states, thereby violating Petitioner's Fourteenth Amendment rights.

With today's immediate electronic dissemination of information via the Internet and 24-hour television news, a private individual's reputation can be irreparably ruined, as with Petitioner, from the irresponsible actions of a media defendant.[1] This is not the intention of the First Amendment freedom of the press. Thus, it is important that this Court set a national minimum standard for the application of the Fair Report Privilege.

I. The Arkansas Supreme Court's Holding That Unconfirmed Witness Statements In Preliminary Police Reports Are Official Public Documents Covered By The Fair Report Privilege Is In Conflict With Other Jurisdictions.

The Fair Report Privilege is set out in the Restatement as follows:

> § 611. Report of Official Proceeding or Public Meeting

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[1] Harm to the reputation of private individuals from false and defamatory statements was illustrated by the recent case of the Duke University students who were wrongly accused of rape. In the Duke lacrosse case, however, the harm was the result of wrongdoing on the part of the district attorney, whereas the harm in the instant case is the result of wrongdoing on the part of the press.

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

Restatement (Second) of Torts § 611. The comments thereto provide further guidance about what constitutes an official action:

> *h. Arrest.* An arrest by an officer is an official action, and a report of the fact of the arrest or of the charge of crime made by the officer in making or returning the arrest is therefore within the conditional privilege covered by this Section. *On the other hand, statements made by the police or by the complainant or other witnesses or by the prosecuting attorney as to the facts of the case or the evidence expected to be given are not yet part of the judicial proceeding or of the arrest itself and are not privileged under this Section.*

Id. at Comment h (emphasis added).

A. Respondents Based Their Articles On Unconfirmed Witness Statements In A Preliminary Police Narrative, Which Is Not A Public Document.

Two young women walked into the Russellville Police Department and gave statements to the

on-duty officer implicating Petitioner in an alleged rape. (T. 296-99) In making a hand-written recording of the statements, the officer was performing a ministerial act required of his position without regard to whether the accusations were hearsay or whether there was any truth whatever to the allegations. The statements were attached to a fill-in-the-blanks form on which the officer recorded the basic facts of the criminal allegations, known as a blotter, which is regularly released to the press. (T. 335) The witness statements are not part of the blotter and are not normally released if there is an ongoing investigation. (T. 334, 335)

This is consistent with the Arkansas Freedom of Information Act ("FOIA"), ACA 25-19-105, the only Arkansas statute that defines what constitutes "public records" and which specifically exempts certain records, including "undisclosed investigations by law enforcement agencies of suspected criminal activity. . . ." (105(a)(1)(A), (b)(6)). *Cf. Arkansas Gazette v. Goodwin*, 304 Ark. 204, 801 S.W.2d 284 (1990) (holding that Arkansas State Police's investigative file on Attorney General Steve Clark was protected from FOIA request by the Arkansas Gazette; with concurring opinion by Justice Turner discussing rationale underlying protection of preliminary investigative documents from public release). Whether the Russellville Police Department voluntarily released the subject witness statements is a material fact question in determining whether the statements are

"public" documents and thus subject to the Fair Report Privilege.

In overruling Petitioner's argument, the Arkansas Supreme Court held, "In the instant case, not only was a report filed based on these witness statements, an investigation commenced by both local and state police. For these reasons, we hold that there was an official action and the information released on the AEGIS system was covered by the fair-report privilege." (App. 10) That expansion of the privilege to cover inadvertently-released preliminary narratives and witness statements is inconsistent with Section 611 and with decisions from other jurisdictions.

B. Other Jurisdictions Have Held That Analogous Statements Are Not Protected By The Fair Report Privilege.

The Massachusetts case of *Reilly v. Associated Press*, 59 Mass. App. Ct. 764, 797 N.E.2d 1204 (2003), *review denied*, 441 Mass. 1103, 803 N.E.2d 333 (2004) involved a newspaper's reliance on the Fair Report Privilege where it reported witness statements from a police report made by a disgruntled dog owner whose pet died after allegedly negligent treatment by a veterinarian. The court's reasoning is cogent and clearly applicable in the instant case:

> The fair reporting privilege derives from the recognition that the general public has the right to know of official government actions that affect the public interest, that news

> outlets are the best way to disseminate such information, and that news outlets would be willing to make such reports only if they were free from liability ... *The privilege* applies to reports by news media outlets of official government action, such as the fact of an arrest, search warrant issued, or a crime charged; but it *does not apply to witness statements to police, whether appearing in an official police report or not, where no official police action is taken.* Such reports are unverified hearsay ... Such unconfirmed hearsay, upon which no police action was taken has neither the authority nor the importance to the public that other documents or statements shielded by the fair reporting privilege possess ... *Extending the privilege in this case would not further the public's interest in learning of official conduct.*

59 Mass. App. Ct. 764, 797 N.E.2d 1204 (2003), *review denied*, 441 Mass. 1103, 803 N.E.2d 333 (2004) (emphasis added).

The Tennessee case of *Lewis v. NewsChannel 5 Network L.P.,* applied to media reports of police arrests or stops, neither of which were involved in the instant case. 2005 WL 3237681 (Tenn. Cir. Ct. Jan. 10, 2005). The *Lewis* court states that the Fair Report Privilege should not be extended to apply to the:

> myriad types of informal reports and official and unofficial investigations, contacts, and communications of law enforcement personnel at all levels of the state and federal

> bureaucracy with local, regional, and national media . . . It should be applied only to reports of official actions or proceedings involving responsible, authoritative decision-makers who assume legal and political responsibility for their actions. Defamation: A Lawyer's Guide §3:10, at 3:30-3:31.

Id.

The court further distinguished reports of official actions that are public and protected by the privilege from the unconfirmed hearsay statements that are often in a preliminary unofficial report:

> Unofficial, off-the-record statements, especially when the source remains confidential, lack the dignity and authoritative weight of official actions and proceedings and, therefore, reports of these statements should not be protected by the fair report privilege. *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 89 (D.C. 1980); *Jonathan Donnellan & Justin Peacock, Truth and Consequences: First Amendment Protection for Accurate Reporting on Government Investigations*, 50 N.Y.L. Sch. L. Rev. 237, 241 (2005-2006). The Restatement (Second) of Torts states that "[a]n arrest by an officer is an official action, and a report of the fact of the arrest or of the charge of crime made by the officer in making or returning the arrest" is within the *fair report privilege; however, "statements made by the police or by the complainant or other witnesses or by the prosecuting attorney as to the facts of the case or the evidence*

> *expected to be given are not yet part of the judicial proceeding or of the arrest itself are not.* Restatement (Second) of Torts § 611 cmt. h, at 301.

Lewis, 2005 WL 3237681 (Tenn. Cir. Ct. Jan. 10, 2005) (emphasis added).

Nevada's Supreme Court has also held that the privilege does not extend to unauthorized or confidential investigatory reports. The court refused to apply the privilege to a Scotland Yard document which was the basis for the defamatory article:

> The document was not available to the public, was never recognized as official by Scotland Yard itself, and was never sent to the British Gaming Control Board, the entity that had first asked for the report. The social policies underlying the fair-report privilege were never intended to permit statements in such documents to be repeated with impunity, to the detriment of the strong social interest in the protection of private reputation.

Wynn v. Smith, 16 P.3d 424 (Nevada 2001).

In *Phillips v. Evening Star Newspaper Company*, the District of Columbia Court of Appeals reasoned:

> the Star's reliance on the 'hot line' log as an official document to provide occasion for the official report privilege is misplaced and incorrect. This log representing the oral police communication from which the Star composed its article does not carry the

> dignity and authoritative weight as a record for which the common law sought to provide a reporting privilege.

424 A.2d 78, 89 (D.C. App. 1980).

That court held that the newspaper was potentially liable to the private individual Petitioner for negligence in reporting:

> This case presents the clashing of two important interests in society, the constitutional freedoms of speech and press against the important reputational interests of private individuals long committed to the State bailiwicks for protection. In light of the constitutional limitations announced by the U.S. Supreme Court in *Gertz*, the common law policy of the District of Columbia to protect private reputational interests and the inapplicability under the facts of this case of any common law privilege, the media Defendant Star is potentially liable to the private citizen Plaintiff, Phillips, for actual damages caused by its defamatory publication under a negligence standard.

Id. at 90.

C. Respondents Knew the Preliminary Report Was Unconfirmed and Unofficial.

Contrary to the trial court's finding in its Order of Dismissal that "there is no dispute that the police report . . . was voluntarily and legally released for

public consumption when [the Russellville Police Department] released the report and statements therein to the Appellees," Petitioner disputed the voluntariness of the release in his Opposition to Respondents' Motion for Summary Judgment (T. 283) and introduced deposition testimony into the summary judgment record that Lt. Falwell intended to set permissions in the computer system restricting the release of the witness statements portion of the police report, upon which the allegedly libelous publications were largely based. (T. 336, 340, 368)

The facts of this case are analogous to a person presenting a check for $100.00 to a bank teller and receiving $1,000.00 in cash. Once the customer realizes that he has $900.00 more than he is entitled to and then walks away with the money, he has committed theft. The Russellville Police Department intended to give The Courier the blotter portion of the police report but not the witness statements, which The Courier discovered when they called Lt. Falwell and the Prosecuting Attorney *before running the story in the first article.*

The original police report was hand-written and marked "Investigation, No Press" when it was left in the in-box of Lt. Charles Falwell of the Russellville Police Department. (T. 10-13, 337) Lt. Falwell, who at the time did press releases for the chief and who was in charge of Freedom of Information requests (T. 333), was reading the report when acting Chief of Police Ridenour took it from him and told him not to release anything on it because it was being turned over to the

State Police and to refer all calls to the prosecutor's office. (T. 339) Lt. Falwell testified that if the Report had not been taken from him, he would have told the secretary that permissions need to be locked down. (T. 340)

Further, the summary judgment evidence clearly establishes that the reporter, editor and publisher of The Courier all knew at the time they published (1) that there was an ongoing investigation into the alleged rape (Ginocchio T. 141; Perkins T. 370; Ronquist T. 69, 70), (2) that it was standard operating procedure for the Russellville Police Department not to release information from an ongoing investigation (T. 334), (3) that they were not supposed to have the narrative portion of the Police Report (T. 367-70), and (4) that the FOIA officer for the Russellville Police Department was himself locked out from accessing the Report. (T. 368)

Respondents Perkins and Ronquist immediately recognized upon receiving the Report that something was remiss because it had more detailed information than Falwell had led them to believe. (T. 381, 367-68) Perkins called Falwell for an explanation (T. 367-68) and was told that he was locked out from seeing the narrative and that he would have to speak with Gibbons regarding it, which was standard operating procedure when there was an ongoing investigation. (T. 334) Ginocchio called Gibbons, who confirmed that there was an ongoing investigation by telling her that he had not made a decision and would not until he reviewed the State Police report. (T. 344, 346)

Accordingly, it was abundantly clear to The Courier before it printed the article that it was not supposed to have the narrative portion of the report.

If The Courier had published the Report upon its receipt without making the calls to authorities, it might have a stronger case under the Fair Report Privilege. However, by making such calls they were put on notice that they did not have a public document within the broad release provisions of FOI, but rather had an investigative report exempted from release. Their choice of persons to call before publishing the article was curious. The only non-official they called was Jones' lawyer, and Jones was not accused of a crime in the Report. They obviously were not interested in whether there was any truth to the accusations but, rather, their connection with the murder case. They called Gibbons and the State Police to find out if "the girl" had recanted, but the alleged victim had not made any accusations to recant. The only accusations were made by her cousin who wasn't present at the gathering. They also called those officials to find out if there was still an active investigation; Gibbons said there was, and they couldn't reach the State Police by telephone.

Prior to the present case, the Arkansas Supreme Court had recognized the Fair Report Privilege in several cases, with varying results.[2] Under somewhat

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[2] *Butler v. Hearst-Argyle Television, Inc.*, 345 Ark. 462, 49 S.W.2d 116 (Ark. 2001); *Brandon v. Gazette Publishing Co.*, 234

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analogous circumstances in an earlier case, the Arkansas Supreme Court had ruled that the Fair Report Privilege did not protect a TV broadcast showing two individuals being placed in a squad car at a shopping mall and reporting that there had been a robbery attempt and an arrest when in fact no arrest had been made and no charges had been filed. *KARK-TV v. Simon,* 280 Ark. 228, 656 S.W.2d 702 (1983). The court stated that it did not reach the question whether the newscast was of an "official action" because even if so, the privilege was lost by an inaccurate report. By doing so the Supreme Court telegraphed a signal that the "official action" requirement of the Fair Report Privilege was an area of unresolved law in Arkansas. In the instant case, the court resolved that issue in a way that is contrary to other jurisdictions and which violated Petitioner's rights.

Ark. 332, 352 S.W.2d 92 (1961); *Jones v. Commercial Printing Co.*, 249 Ark. 952, 463 S.W.2d 92 (1971); *City of Fayetteville v. Rose*, 294 Ark. 468, 743 S.W.2d 817 (1988); *McCambridge v. City of Little Rock*, 298 Ark. 468, 219, 766 S.W.2d 909 (1989); *Martin v. Musteen,* 303 Ark. 656, 799 S.W.2d 540 (1990).

II. The Arkansas Supreme Court's Holding That Malice Is Irrelevant To The Fair Report Privilege Conflicts With Other Jurisdictions.

The Opinion stated:

> Finally, Whiteside argues that the privilege should not apply to the articles because of malice and excessive publication on the part of the Newspaper. However, it is clear that those issues are not part of the analysis under the fair-report privilege. This court has determined that the privilege is only lost by a failure to ensure that the report is accurate and complete or a fair abridgment.

(App. 18)

A. Respondents' Defamatory Articles Went Beyond The Gist Of The Original Police Narrative And Placed The Unconfirmed Rape Allegations In The Context Of A Sensational Murder Case.

If the Fair Report Privilege applies in this case to the witness statements, which Petitioner denies, Respondents must, in order to prevail, show that the newspaper reported the "gist" of the source documents. *KARK-TV v. Simon,* 280 Ark. 228, 656 S.W.2d 702 (1983); *Jones v. Commercial Printing Co.,* 249 Ark. 952, 463 S.W.2d 92 (1971). In other words, if the reports were not fair and accurate, the privilege is lost.

The fourth sentence of the article states: "The Courier obtained police documents from the Russellville Police Department's AEGIS computer system detailing the victim's complaint," which is an untrue statement. Actually, the victim did not make a complaint of criminal conduct, only stating that she had a couple of alcoholic drinks and woke up naked and sore but couldn't remember what happened. (T. 296-99) Had the allegations of rape trumpeted in the headlines of the article been accurately attributed to the cousin of the victim who was not even at the party and which were based entirely upon hearsay, the entire tenor and impact of the accusations against Petitioner would have been greatly reduced.

The most serious allegation made against Petitioner in the article is stated as follows: "According to the police report, Huckabay checked on the victim a second time and saw Whiteside allegedly having sexual contact with the victim while Jones allegedly watched. After Huckabay asked if the men planned on 'just taking turns,' she was told to leave again, according to the cousin's statement." The first sentence attributes the allegation to the police report, creating the impression that the allegation was a result-of-some-police determination. Only the second sentence about "taking turns" is correctly attributed to the cousin's hearsay statement. The very next statement, in a stand-alone paragraph, creates the same incorrect impression: "When Huckabay approached the bedroom a third time, she allegedly found the door locked, and *according to the police*

report [emphasis supplied], text-messaged Jones, who was in the bedroom with the victim, Whiteside and Simmons." That accusation was in the cousin's statement, not in the blotter. (T. 296-99) The article is replete with juxtaposition of "police report" and "cousin's statement," reasonably leading the reader to conclude that the police report represented an official action following investigation of the cousin's statement.

In the follow-up, the reporter for The Courier writes that no charges were filed by the Prosecuting Attorney because "the case wasn't strong enough to prove the rape allegation," and includes a direct quote to the paper that "the evidence was not strong enough" but failed to include the one sentence of prosecutor Gibbon's determination letter, which clearly is an official public document, that totally exonerated Petitioner: "It should be noted that there is no evidence at all that Ryan Whiteside or Kevin Jones, both of whom were also mentioned in the initial incident report, had any sexual contact with the complainant at any time during the 28th and 29th of December." (T. 195)

There was no good reason why that statement was not included in the follow-up. Instead, the follow-up includes a quote "there was a lack of evidence for prosecution," attributed to the Prosecutor in a conversation with the reporter after the determination letter was released (T. 169), thereby confusing a report of a public document with the reporter's own investigative reporting. The quote substituted for the

exoneration statement leaves room for doubt regarding Petitioner's culpability, reasonably implying that the decision not to file charges was a discretionary determination based upon conflicting evidence or other considerations. This alone is a fatal flaw in the follow-up and takes Respondents outside the Fair Report Privilege. The Clarification later published by the newspaper is an admission of fault in failing to accurately report the determination letter and in no way alters the fact that follow-up was not a fair and accurate report of said letter.

There is further reason to deny the protection of the Fair Report Privilege to the publication of the follow-up. At the time such article was published, the newspaper knew that the alleged source of the hearsay allegations in the witness statement denied making the allegations and had told the police that the statements were not true, yet the newspaper reported them again by way of background, thereby constituting actual malice and excessive publication.

Upon complaint by the Petitioner's family, The Courier ran the third article, the Clarification, which reported the "no evidence at all" determination by the Prosecutor but prefaced it with an unnecessarily derogatory statement that Petitioner was in the room while Simmons and Roper had sex: "although suspect Jeffrey Simmons confirmed to Arkansas State Police investigators that Kevin Jones and Ryan Whiteside were in the room while Simmons allegedly had sex with the accuser. . . ." (T. 170) Because such allegation had already been published by the paper and was

unrelated to the Prosecutor's determination, which The Courier had omitted, it clearly constitutes excessive publication, thereby waiving the Fair Report Privilege.

If a qualified privilege applies to a publication, it is lost if the publication is made with malice, or if made with lack of grounds for belief in its truthfulness, or if the privilege is abused by excessive publication. *Wal-Mart Stores Inc. v. Lee,* 348 Ark. 707, 74 S.W.3d 634 (Ark. 2002); *Superior Federal Bank v. Mackey,* 129 S.W.3d 324, 84 Ark. App. 1 (2003) and *Addington v. Wal-Mart Stores, Inc.,* 81 Ark. App. 441, 105 S.W.3d 379 (2003). Even if the Court concludes that the three articles published by Respondents were subject to a qualified privilege, that privilege was lost for all three articles for these reasons: Respondents reported in the first article the allegations from the Report without any reason to think they were true because they were obviously double hearsay, and Respondents did not ask for corroboration from the source of the information or inquire of any of the subjects of the rumors. The newspaper employees testified that they didn't care whether the underlying statements were true or not. That is malice under *New York Times Co. v. Sullivan.*

The paper rushed to publication because of the intense drive to publish anything connected to Nona Dirksmeyer's death in the belief that it would sell newspapers. The sub-headline of the article contained reference to the murder trial, and Petitioner and Jones were the first subjects of the article because of

their connection to the trial, even though Jones was not accused of any crime at the gathering and Petitioner was not the person who allegedly had sexual intercourse with the alleged victim.

That is both malice and excessive publication. Even when the Respondents attempted in the third article, the Clarification, to rectify their critical error in failing to include in the follow-up the statement in the prosecuting attorney's Determination Letter completely exonerating Petitioner from any culpability, they gratuitously added a statement that Simmons had told the State Police that Petitioner and Jones were in the room while Simmons allegedly had sex with the accuser. That is excessive publication and malicious. *Jones v. Commercial Printing Co.*, 249 Ark. 952, 463 S.W.2d 92 (1971).

While the three articles in The Courier were being published, the reporter on the first two, Defendant Ginocchio was posting to an internet website which was a forum for discussion of the Dirksmeyer murder case in her own name and under an assumed name disparaging the character of the subjects of the articles and stating her belief that even though the decision was made not to prosecute, there really was something to the allegations. There could be no clearer proof of her personal bias against and malice toward Petitioner and his friends at the gathering. It also explains why she wrote in the follow-up that there was a lack of evidence to prosecute rather than including Gibbons' statement in the Determination Letter that there was no evidence of rape and the

sentence stating there was "no evidence at all" that Petitioner had any sexual contact with the complainant.

B. Other Jurisdictions Have Held That The Fair Report Privilege Does Not Protect Media Defendants When It Is Abused.

The New Jersey Superior Court, Appellate Division, held that the Fair Report Privilege did not apply to newspaper articles that went beyond the "sting" of the original source documents, in *Salzano v. North Jersey Media Group,* 958 A.2d 1023 (N.J. Super. A.D. 2008).

The Illinois Supreme Court has also held that the Fair Report Privilege does not protect defamatory articles that go beyond the gist of the original documents. *Solaia Technology, LLC v. Specialty Publishing Co.,* 852 N.E.2d 825, 846 (Ill. 2006).

In another Illinois case, the appellate court held that even though the Fair Report Privilege applied there, it had been abused, and the summary judgment was reversed. *Newell v. Field Enterprises, Inc.,* 415 N.E.2d 434, 446, 452 (Ill. App. 1980).

The United States District Court for the District of Minnesota held that the Fair Report Privilege did not apply where the defamatory broadcast included a deputy's statements of unconfirmed suspicions: "In this case, . . . , the media defendants did much more

than reiterate or summarize official documents or proceedings. They broadcast Johnson's allegedly defamatory statements, statements nowhere to be found in any public record." *Stokes v. CBS, Inc.*, 25 F.Supp.2d 992, 1067 (D. Minn. 1998).

In the instant case, Respondents' false and defamatory articles suggesting that Petitioner had committed rape, repeatedly published in the context of a local sensational murder trial, went beyond the gist of the original police narrative. In doing so, Respondents abused any Fair Report Privilege that may have applied.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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SUPREME COURT OF ARKANSAS

No. 08-313

RYAN WHITESIDE, APPELLANT, VS. RUSSELLVILLE NEWSPAPERS, INC., PAXTON MEDIA GROUP, LLC, NEAL RONQUIST, SCOTT PERKINS, & JANIE GINOCCHIO, APPELLEES,	**Opinion Delivered** March 12, 2009 APPEAL FROM THE POPE COUNTY CIRCUIT COURT, NO. CV-07-47, HON. DENNIS CHARLES SUTTERFIELD, JUDGE. *AFFIRMED.*

PAUL E. DANIELSON, Associate Justice

Appellant Ryan Whiteside appeals from the circuit court's order granting summary judgment to appellees Russellville Newspapers, Inc., Paxton Media Group, LLC, Neal Ronquist, Scott Perkins, and Janie Ginocchio (collectively, "the Newspaper") in an action for libel and defamation.[1] He further appeals from the circuit court's order denying his motion for new trial. Whiteside asserts four points on appeal: (1) that the circuit court erred in holding that witness statements in a police report were official public

[1] According to the complaint in this action, Russellville Newspapers, Inc. publishes the Courier News in Russellville; Janie Ginocchio authored the article; Scott Perkins is the editor of the Courier; Neal Ronquist is the publisher of the Courier; and Paxton Media Group is the owner.

documents; (2) that the circuit court erred in finding that witness statements in a police report were voluntarily and legally released; (3) that the circuit court erred in finding that the Newspaper's publications conveyed a substantially fair and correct account of a police report and a prosecutor's letter; and (4) that the circuit court erred in finding that no material facts were in dispute regarding whether the appellees were entitled to the benefit of the fair-report privilege. We affirm.

In January 2007, Neal Ronquist, publisher of the Newspaper, heard a radio report of an alleged rape and believed the Newspaper should look into the story. At that time, the Russellville Police Department allowed the Pope County media to access its AEGIS computer system through a dedicated terminal at the police department, and it determined what documents and records for which it would allow access through the AEGIS system. On January 10, 2007, the Newspaper obtained copies of a case report filed by one of the officers that had been on duty December 31, 2006. The case report revealed that a nineteen-year-old girl had been allegedly raped at a party at Whiteside's home on December 28, 2006. The details in the case report were based on information obtained from the alleged victim and her cousin. The Newspaper subsequently published articles based on the rape allegation and surrounding events.

On February 5, 2007, Whiteside filed his original complaint against the Newspaper. In it, he asserted a "claim and cause of action for libel and defamation

. . . to recover actual and exemplary or punitive damages for substantial and irreparable injury . . . caused and resulting from Defendants' publishing in the Courier of untruths and falsehoods concerning the integrity and character of the Plaintiff."

Whiteside's claims were premised upon an article published by the Newspaper on January 11, 2007, which stated that the Arkansas State Police were investigating an alleged rape that took place during a party at Whiteside's home. The article stated that the Newspaper had obtained police documents detailing the victim's complaint from the Russellville Police Department's AEGIS computer system. It further stated that, according to the police report, the victim's cousin recounted to police a conversation she had with Chelsea Huckabay, who had attended the party. In that conversation, the article stated, Huckabay said that "Jeffery Simmons allegedly put half a tab of the drug Ecstasy in the victim's glass of water, which she drank." Huckabay said that after hearing the victim crying, she checked on her, and she saw Simmons having sexual intercourse with the victim. She further told the victim's cousin, as reported in the article. that she returned to check on the victim and saw "Whiteside allegedly having sexual contact with the victim" while his friend allegedly watched. The article continued to set forth the events of that night, as allegedly relayed by Huckabay to the victim's cousin to the police. The Newspaper then reported that the victim underwent a rape examination, and

the clothes she wore to the party were placed into evidence.

Whiteside's complaint alleged that on January 4, 2007, prior to the article's publication, "the source of the hearsay allegations against Plaintiff reported to the Arkansas State Police that she did not tell the accuser's cousin that she saw anyone giving the accuser drugs, or that she saw Plaintiff having sexual contact with the accuser. She further told the State Police that 'she didn't feel that [the accuser] was being made to do things she did not want to do.'" Accordingly, Whiteside asserted, at the time of publication, no one had accused him of any misconduct based on firsthand information, "a fact that Defendants knew or reasonably should have known." In addition, Whiteside asserted in support of his claims, the Newspaper published a follow-up article on January 14, 2007, which he claimed omitted a statement by the local district attorney that there was no evidence that Whiteside had had sexual contact with the victim, and, further, recounted the majority of allegations made in the article of January 11. While the Newspaper did print a "clarification" on January 18, 2007, which included the statement of the district attorney, Whiteside asserted that the clarification "added salacious allegations not related to criminality."

On August 6, 2007, the Newspaper moved for summary judgment. It asserted that it was entitled to summary judgment for the "following three reasons, any one of which alone provides a sufficient

independent basis for" summary judgment in its favor:

> (a) Plaintiff Ryan Whiteside ("Whiteside") cannot prove the falsity of any of the statements in the articles which form the basis for Whiteside's libel action;
>
> (b) The three articles which form the basis for Whiteside's complaint are protected under the fair-report privilege, and there is no evidence that the fair-report privilege has been lost; and
>
> (c) Whiteside is a limited-purpose public figure who cannot prove actual malice.

On November 16, 2007, the circuit court held a hearing on the Newspaper's motion for summary judgment, and on November 19, 2007, the circuit court issued its order granting the motion and dismissing Whiteside's complaint with prejudice. Whiteside then filed a motion for new trial and relief from judgment on November 30, 2007, which the circuit court denied by an order issued on December 3, 2007. It is from those two orders that Whiteside appeals.

Whiteside first submitted a brief without a proper addendum in violation of Arkansas Supreme Court Rule 4-2(a)(8) (2008), and on December 11, 2008, this court ordered him to file a substituted abstract, addendum, and brief in compliance with our rules. *See Whiteside v. Russellville Newspapers, Inc., et. al*, ___ Ark. ___, ___ S.W.3d ___ (Dec. 11, 2008). He

has done so, and his appeal is now properly before this court.

Whiteside first argues that the witness statements that were released with the case report on the AEGIS computer system should not have been considered part of the official document subject to the fair-report privilege and, therefore, that the circuit court erred in granting summary judgment in favor of the Newspaper. The Newspaper avers that all the information obtained from the AEGIS system, including the portions of the case report that recount witness statements and the portions that detail the initial steps taken by the police officer on duty to investigate the allegations, constitutes official documents that led to an investigation by the Arkansas State Police and is covered by the fair-report privilege.

This court's standard of review for summary judgment is well settled:

> Summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law. Once a moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. After reviewing undisputed facts, summary judgment should be denied if, under the evidence, reasonable minds might

> reach different conclusions from those undisputed facts. On appeal, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its motion leave a material question of fact unanswered. This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. Our review is not limited to the pleadings, as we also focus on the affidavits and other documents filed by the parties.

Sykes v. Williams, 373 Ark. 236, 239-40, ___ S.W.3d ___, ___ (2008) (internal citations omitted).

It is clear from the record that the circuit court based its order granting summary judgment in favor of the Newspaper on the fair-report privilege. Our court has previously recognized this privilege. *See Butler v. Hearst-Argyule Television, Inc.,* 345 Ark. 462, 49 S.W.3d 116 (2001); *KARK-TV v. Simon,* 280 Ark. 228, 656 S.W.2d 702 (1983). The fair-report privilege is defined in the *Restatement (Second) of Torts* § 611 (1977), captioned "Report of Official Proceeding or Public Meeting." Section 611 provides that:

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate

> and complete or a fair abridgment of the occurrence reported.

The first issue, therefore, is whether or not the information regarding the rape allegations in the underlying case that was obtained from the AEGIS system was a report "of an official action or proceeding." This is an issue of first impression in Arkansas; however, the comments to section 611 provide us with some guidance.

The comment on official proceedings explains:

> The privilege covered in this Section extends to the report of any official proceeding, or *any action taken by any officer or agency of the government of the United States, or of any State or of any of its subdivisions.* Since the holding of an official hearing or meeting is in itself an official proceeding, the privilege includes the report of any official hearing or meeting, even though no other action is taken. *The filing of a report by an officer or agency of the government is an action bringing a reporting of the governmental report within the scope of the privilege.*

Restatement (Second) of Torts § 611 cmt. d (1977) (emphasis added). While Whiteside relies on comment h to section 611, that comment specifically deals with an arrest situation. The witness statements Whiteside complains of in the instant case were not part of an arrest. Here, the statements made were not only attached to the blotter as part of the

official police report, but were included in the report itself in the officer's narrative.

Case law from various jurisdictions supports the principle that, generally, information released by the police, including reports and records, is considered to be a report of an official action subject to the fair-report privilege. *See Yohe v. Nugent,* 321 F.3d 35 (1st Cir. 2003) (statements made to the press by the police chief based on witness statements); *Kenney v. Scripps Howard Broad. Co.,* 259 F.3d 922 (8th Cir. 2001) (information obtained from a missing-person report, a pick-up order, and an investigative report); *Porter v. Guam Publ'n, Inc.,* 643 F.2d 615 (9th Cir. 1981), *cert. denied,* 454 U.S. 940 (1981) (a police investigation obtained from a "daily police bulletin" of criminal complaints and arrest reports, even when based on false charges made by the complainant); *Northland Wheels Roller Skating Ctr. Inc. v. Detroit Free Press, Inc.,* 213 Mich. App. 317, 539 N.W.2d 774 (1995) (information obtained from the police department's written reports or records generally available to the public); *Erickson v. Pulitzer Publ'g Co.,* 797 S.W.2d 853 (Mo. Ct. App. 1990) (information obtained from incident reports of the police department); *Biermann v. Pulitzer Publ'g Co.,* 627 S.W.2d 87 (Mo. Ct. App. 1981) (information obtained from arrest warrants, bonds, and affidavits of the prosecuting attorney that were taken from police department files); *Thomas v. Tel. Publ'g Co.,* 155 N.H. 314, 929 A.2d 993 (2007) (information obtained from a pre-sentence investigation report); *Goss v. Houston Cmty. Newspapers,* 252

S.W.3d 652 (Tex. Ct. App. 2008) (information obtained from a press release). In the instant case, not only was a report filed based on these witness statements, an investigation commenced by both local and state police. For these reasons, we hold that there was an official action and the information released on the AEGIS system was covered by the fair-report privilege.

Whiteside next alleges that the witness statements were illegally released and the Newspaper committed theft by retaining the statements and converting them to their pecuniary gain after learning that they did not have voluntary possession of the statements. The Newspaper avers that this argument is made for the first time on appeal and, in addition, that the Newspaper should not be faulted for obtaining the report on the AEGIS system when it was placed there by an employee of the police department devoid of any restrictions. Furthermore, the Newspaper contends that there is no evidence that anyone asked it to return the information or refrain from publishing it.

We agree that Whiteside argues for the first time on appeal that the Newspaper committed theft. Whiteside's counsel in fact stated to the court at the hearing, "[w]ell, they really didn't steal anything," before continuing on to analogize the situation to someone finding another person's billfold on the sidewalk with a thousand dollars in it. This court has repeatedly held that we will not address an argument

raised for the first time on appeal. *See Sykes v. Williams,* 373 Ark. 236, ___ S.W.3d ___ (2008).

Further, we find no merit in Whiteside's argument that the circuit court erred by finding that the report was voluntarily and legally released. The evidence presented by Whiteside illustrates, at best, that the release was inadvertent.

In reviewing the record, it is undisputed that the Russellville Police Department used the AEGIS computer system to manage their records and, at the time of the instant case, allowed the Newspaper to access the blotter. Normally, the blotter contained everything from a case report but the narrative portion. The officer that filed the report included a narrative portion that Lieutenant Charles Falwell of the Russellville Police Department admitted should not have been part of the blotter; however, it was released on the AEGIS system in the case report. Scott Perkins, editor of the Newspaper, testified that he called Falwell inquiring about an alleged rape and its report but was told that there would not be much in the report. When Perkins accessed the report, he got a more detailed incident report than he expected and called Falwell again. Perkins testified that Falwell simply said he was locked out of the report and that Perkins must have a good reporter. Falwell admitted that he did not tell Perkins there were any restrictions on the release of the information in that case report or that the report should not have been released. There is no evidence in the record that suggests the Newspaper obtained this information

dishonestly. On the contrary, the evidence shows the Newspaper obtained the information through the AEGIS system, a system that the police specifically permitted the Newspaper to access. While the release of a specific portion of the report may have been a mistake made by the police, it was not the result of any wrongdoing by the Newspaper.

Whiteside argues that the Newspaper should have known that the witness statements were not supposed to be part of the blotter. However, there is nothing to suggest that the privilege is lost because the Newspaper failed to investigate whether or not it was supposed to have access to that portion of the report. In fact, the United States Supreme Court has held that the First Amendment protects against the "timidity and self-censorship" that may result from such an approach. *See The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (citing *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975)). The Court in *The Florida Star* stated:

> [D]epriving protection to those who rely on the government's implied representations of the lawfulness of dissemination, would force upon the media the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication. This situation could inhere even where the newspaper's sole object was to reproduce, with no substantial change, the government's rendition of the event in question.

Id. at 536.

It seems clear that an inadvertent release of information is not analogous to an involuntary release or an illegal gain of information. As discussed, the record is devoid of any evidence of any wrongdoing on the part of the Newspaper in obtaining the information. It was not incumbent upon the Newspaper to determine what information could or could not be published after its release by the police. Therefore, we affirm the circuit court's finding that the information was lawfully and legally obtained.

For his final point on appeal, Whiteside argues that if the privilege applied in this case, it was lost because the articles were not a fair and accurate report. The Newspaper avers that the articles were substantially accurate reports of information taken from official documents and that it conveyed the required gist or sting of that information.

This court has previously discussed the privilege granted by section 611 and the loss of that privilege should the publisher not give a fair and accurate report:

> According to the comments to section 611, the basis of the privilege is the "interest of the public in having information made available to it as to what occurs in official proceedings and public meetings." [*Restatement (Second) of Torts* § 611 (1977)], cmt. a. Significantly, the privilege exists "even though the publisher himself does not believe the defamatory words he reports to be true and even when he knows them to be

> false. Abuse of the privilege takes place, therefore, when the publisher does not give a fair and accurate report of the proceeding." *Id.*
>
> With regard to the accuracy and fairness of the report, it is enough that it conveys a substantially correct account of the proceedings. *Id.*, cmt. f. Furthermore, although it is unnecessary that the report be exhaustive and complete, it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression. *Id.* The privilege does not apply where a person testifies in a proceeding solely for the purpose of obtaining the fair-report shield for himself or in collusion with a third party. *Id.*, cmt. c.

Butler v. Hearst-Argyule Television, Inc., 345 Ark. 462, 468, 49 S.W.3d 116, 119-20 (2001).

In addition to considering the comments provided in section 611, this court has applied the substantial-truth doctrine in testing the accuracy of a report. *See KARK-TV v. Simon,* 280 Ark. 228, 229, 656 S.W.2d 702, 703 (1983). The literal truth is not necessary, the substantial truth will suffice, and, as long as the gist or the sting of the publication is in essence true, some minor conflicts in what was alleged will not eliminate the privilege. *See id.* (citing *Pritchard v. Times Sw. Broad., Inc.*, 277 Ark. 458, 642 S.W.2d 877 (1982)).

Whiteside alleges that there were several statements included in the articles that made them

unfair and inaccurate. One sentence in the January 11, 2007 article reads: "The Courier obtained police documents from the Russellville Police Department's AEGIS computer system detailing the victim's complaint." Whiteside argues that statement is false because the victim did not make a detailed complaint of criminal conduct. We do not agree. While the report was made by both the victim and her cousin, the report clearly lists the victim's name as the victim, and details were placed in the report by both of the women.

Additionally, Whiteside argues that "the article is replete with juxtaposition of 'police report' and 'cousin's statement,' reasonably leading the reader to conclude that the police report represented an official action following investigation of the cousin's statement." Again, we do not agree. Before several of the cousin's statements were revealed in the article, the article specifically reads: "In a separate statement given to police, the victim's cousin recounted a Dec. 31 conversation she had with Chelsea Huckabay, who was at the party, about what allegedly happened." The next few paragraphs discuss the details of what, according to the victim's cousin, Chelsea Huckabay had witnessed. While a few sentences attributed the information to the report rather than the cousin's statement, it is clear when looking at those paragraphs as a whole, that the information had been gathered from the report, as recounted to the police by the victim's cousin. This court cannot hold that the article was not an accurate and complete or a fair

abridgment of the occurrence reported. Although the information came from the victim's cousin, all but one of the details published was recorded in the actual police report.[2] Therefore, while the juxtaposition of "police report" and "cousin's statement" might have been a bit confusing, we cannot hold it was enough to eliminate the privilege.

The Newspaper published a follow-up article on January 14, 2007, based upon statements made by David Gibbons, the prosecuting attorney, and a letter that Gibbons wrote on January 12, 2007, to Stacie Rhoads, a special police agent. The article revealed that no charges were filed in the case because, as the letter stated, "the [Arkansas State Police]'s interview with Huckabay 'produced a scenario diametrically opposed' to what was alleged in the initial police report," and because, as Gibbons explained, "there was a lack of evidence for prosecution." Also provided in the article was the background of the case from the

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[2] The Newspaper admitted that the sentence stating "When Huckabay approached the bedroom a third time, she allegedly found the door locked, and according to the police report, text-messaged Jones, who was in the bedroom with the victim, Whiteside and Simmons," was actually not included in the police report. However, Whiteside admits that the accusation was part of the cousin's statement and does not challenge that as a false fact. On the contrary, Whiteside admitted that he locked his bedroom door, and that he and Jones stayed in the room while Simmons had sexual intercourse with the victim. In addition, the very next sentence in the article regarding an alleged text-message response from Jones clarifies that it was according to the cousin's statement.

initial police report and additional details gathered from the Arkansas State Police investigation. The article further revealed that Huckabay's story was very different from what the alleged victim's cousin told the police and that Simmons had admitted to consensual sex. A part of Rhoads's report was published which declared "it was apparent that [the accuser] had some knowledge of the events and even joked with the encounters [sic]." Two of the alleged victim's text messages that she sent to Simmons after the alleged incident were also published, and the article explained that there were seven more.

Whiteside contends that the follow-up article was not protected by the fair-reporting privilege because it did not include the sentence from Gibbons's letter that "totally exonerated" Whiteside, and there was "no good reason why such sentence was not included in the Follow-up." First, this argument is irrelevant because Whiteside is not claiming he was defamed by the new information included in the follow-up article; therefore, the Newspaper has no reason to invoke that privilege. While the follow-up article did repeat information from the first article, because we hold that the privilege applies to the fair and accurate report of that information, the second publication of the same information is of no significance. Furthermore, Whiteside does not cite any authority or provide a meritorious argument as to why the omission of a single sentence is equivalent to the failure of the Newspaper to report the "gist" or the "sting" of the situation. It is elementary that this

court will not consider an argument if the appellant does not make a convincing argument or cites no authority to support it. *See Maulding v. Price's Util. Contractors, Inc.*, ___ Ark. ___, ___ S.W.3d ___ (Feb. 12, 2009).

Finally, Whiteside argues that the privilege should not apply to the articles because of malice and excessive publication on the part of the Newspaper. However, it is clear that those issues are not part of the analysis under the fair-report privilege. This court has determined that the privilege is only lost by a failure to ensure that the report is accurate and complete or a fair abridgment. *See Butler,* 345 Ark. at 469, 49 S.W.3d at 121. We hold that the Newspaper fairly and accurately reported the information as released by the police on the AEGIS system.

For these reasons, we affirm the circuit court's order granting summary judgment in favor of the Newspaper, and we affirm the circuit court's order denying Whiteside's motion for a new trial.

Affirmed.

IN THE CIRCUIT COURT OF
POPE COUNTY, ARKANSAS
DIVISION IV

RYAN WHITESIDE PLAINTIFF

VS. No CV-2007-47

RUSSELLVILLE
NEWSPAPERS, INC.,
PAXTON MEDIA
GROUP, LLC,
NEAL RONQUIST,
SCOTT PERKINS, and
JANIE GINOCCHIO

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND DISMISSING PLAINTIFF'S COMPLAINT WITH PREJUDICE

(Filed Nov. 19, 2007)

A hearing was held on Friday, November 16, 2007 in the above referenced case on the defendants' Motion for Summary Judgment in the above referenced case. At the conclusion of the hearing, the court took the matter under advisement. The court now enters its order:

Arkansas Rules of Civil Procedure 56 sets out the standard that guides this court in its consideration of the defendants' Motion for Summary Judgment. Pursuant to Rule 56 a "judgment shall be rendered shall be rendered [sic] forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, shows

that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law on the issues specifically set forth in the motion."

This court first addresses the issue of whether or not there exists any genuine issue as to material fact in this case which would prevent the entry of a judgment in this matter at this time. In doing so, this court must first consider the fair-report privilege raised by the defendants specifically and whether or not there is any genuine issue of material fact existing as to the assertion of this privilege. If the defendants can successfully claim the fair-report privilege then neither the legal status of the plaintiff as a private or public person nor whether malice exists matters, and all other issues raised by the motion become moot.

There is no factual dispute that the plaintiff's cause of action is based upon newspaper articles published on January 11, 2007 and January 15, 2007. The contents of those written publications plainly are not in dispute. There is no factual dispute that the January 11, 2007 newspaper story was based upon a December 31, 2006 police report, witness statements and documents generated by the Russellville Police Department. The contents of the Police Department documents are not in dispute.

There is no factual dispute as to the contents of the January 15, 2007 article or that it was based upon the December 31, 2006 police report and

documents of the Russellville Police Department and a January 12, 2007 letter from Prosecuting Attorney David Gibbons. There is no factual dispute as to the contents of the January 12, 2007 letter.

Therefore, this court finds that there are not disputes regarding any material facts as regards as to the issue of whether or not the defendants in this case are entitled the benefit of the fair-report privilege. It only remains for this court to apply the law to these uncontested facts. The articles speak for themselves and so does the police report, documents and prosecuting attorney's letter.

First, the court would state that the uncontested facts establish that the police report, witness statements and prosecutor's letter, upon which the defendants rely, are official public documents.

There is no dispute that the police report was generated by the Russellville Police Department in the course of an official police investigation and that it was voluntarily and legally released for public consumption when it released the report and statements therein to the defendants. There is also no dispute that the letter of Prosecuting Attorney, David Gibbons, is an official public document voluntarily and legally released for public consumption.

The legal question that remains is whether or not the Courier's publications convey a substantially correct account of the Russellville Police Department Report and the prosecutor's letter. This court finds that they do. It is not necessary that the report be

exhaustive and complete, but it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression.

In testing the accuracy of the reporting under the fair-report privilege, this court is required to apply "the substantial truth doctrine" recognized in the case of *Pritchard v. Times Southwest Broadcasting, Inc.*, 458, 642 S.W.2d 877 (1982). Under that doctrine, the literal truth is not necessary and substantial truth, sometimes referred to as the "gist" or the "sting", will suffice. In other words, under the fair-report privilege, the gist of the "sting" of an official action or proceeding must be accurately conveyed in the publication.

The court finds that the publications at issue in this case were a fair and substantially true account of the police report, police documents and prosecutor's report and that there is no showing of that these publications stated any untruths outside that context. The police reports, statements and other documents may contain untruths, but as long as the defendants gave a substantially fair account of the contents of those documents then they are not liable under the fair-report privilege doctrine.

Therefore the court grants the defendants' Motion for Summary Judgment and dismisses the plaintiff's complaint with prejudice.

IT IS SO ORDERED.

/s/ Dennis C. Sutterfield
DENNIS C. SUTTERFIELD
CIRCUIT JUDGE
DATE: November 19, 2007

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IN THE CIRCUIT COURT OF
POPE COUNTY, ARKANSAS
DIVISION IV

RYAN WHITESIDE PLAINTIFF

vs. No CV-2007-47

RUSSELLVILLE
NEWSPAPERS, INC.,
PAXTON MEDIA
GROUP, LLC,
NEAL RONQUIST,
SCOTT PERKINS, and
JANIE GINOCCHIO

ORDER DENYING MOTION FOR NEW TRIAL AND RELIEF FROM JUDGMENT; AND CLARIFICATION

(Filed Dec. 3, 2007)

Now comes before the court the plaintiff's Motion for New Trial and Relief form Judgment and the same is hereby denied.

Further, the court states as a point of clarification that its decision was indeed based upon a consideration of all three newspaper articles referred to in the plaintiff's complaint along with all of the other pleadings, exhibits and affidavits herein; and respective arguments of counsel.

IT IS SO ORDERED.

/s/ Dennis C. Sutterfield
DENNIS C. SUTTERFIELD
Circuit Judge
Date: 12-3-07

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Leslie W. Steen
Clerk

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April 16, 2009

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RE: 08-313. Ryan Whiteside v. Russellville Newspapers, Inc. et al.

Dear Attorneys:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for rehearing is denied."

Sincerely,

/s/ Leslie W. Steen
Leslie W. Steen, Clerk

WS:jko

cc: E.B. Chiles
John E. Tull
Fern Tucker, Clerk
(CV-07-47)